

STATE OF MICHIGAN
COURT OF APPEALS

TERRI KRONBERG,

Plaintiff-Appellee,

v

THOMAS K. MATHEW, M.D., d/b/a UROLOGY
CENTER,

Defendant-Appellant,

and

KONDA B. C. MOULI, M.D., d/b/a UROLOGY
CENTER, EMMA L. BIXBY MEDICAL
CENTER, and LENAWEE HEALTH ALLIANCE,
INC.,

Defendants.

UNPUBLISHED

September 11, 2008

No. 274867

Lenawee Circuit Court

LC No. 03-001184-NH

Before: Owens, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Plaintiff sued defendants for medical malpractice. The case went to trial against defendant Thomas K. Mathew, M.D. (hereinafter “defendant”) after the other parties were dismissed. The jury found that defendant was negligent and that his negligence proximately caused plaintiff’s injuries. The trial court entered a final judgment for plaintiff in the amount of \$171,200. Defendant appeals as of right. We now affirm.

Plaintiff underwent a bladder-suspension surgery, which defendant performed, in November 2000; the surgery was to relieve symptoms of urinary incontinence. However, after the surgery, she continued to have problems with urinary leakage and also began suffering severe pain when urinating. In March 2001, defendant performed a cystoscope on plaintiff’s bladder and discovered that a suture was inside the dome, or top, of plaintiff’s bladder. Defendant cut that suture, but plaintiff’s symptoms only improved for about a day or two, and, in fact, her symptoms kept getting worse. Plaintiff then underwent multiple procedures, in 2002 and 2003, to remove additional sutures that had entered her bladder and on which stones had formed. In August 2003, plaintiff finally obtained relief after she underwent another surgical procedure to remove a mass that had developed on her vaginal wall.

Plaintiff's theory was that defendant committed malpractice during the original surgery by placing a suture in the dome of plaintiff's bladder and that other sutures were allowed to erode into the bladder also as a result of defendant's negligence.

Defendant first argues that the trial court erred in limiting the scope of the testimony of Dr. David Johnson, defendant's expert witness. This Court reviews a trial court's decision regarding the qualifications of a proposed expert witness to testify for an abuse of discretion, and "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

The trial court granted plaintiff's motion in limine, ruling that Dr. Johnson could not offer testimony that the suture defendant discovered in the dome of plaintiff's bladder in March 2001 could have been there as a result of erosion, because the court was not convinced that Dr. Johnson's opinion satisfied the requirements of MRE 702.

MRE 702 provides as follows:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004), the Court clarified that MRE 702 requires that the trial court, in its role as gatekeeper, ensure that each aspect of an expert witness's proffered testimony is reliable.

This gatekeeper role applies to *all stages* of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology.

Careful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation. The United States Supreme Court's caveat in *Joiner* [*General Electric Co v Joiner*, 522 US 136; 118 S Ct 512; 139 L Ed 2d 508 (1997)] is persuasive:

"[N]othing in either *Daubert* [*Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993)] or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."

When a court focuses its MRE 702 inquiry on the data underlying expert opinion and neglects to evaluate the extent to which an expert extrapolates from those data in a manner consistent with *Davis-Frye*¹ (or now *Daubert*), it runs the risk of overlooking a yawning “analytical gap” between that data and the opinion expressed by an expert. As a result, ostensibly legitimate data may serve as a Trojan horse that facilitates the surreptitious advance of junk science and spurious, unreliable opinions. [*Gilbert, supra* at 782-783 (footnotes omitted; emphasis in original).]

In *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067, 1067; 729 NW2d 221 (2007), the Court explained that the proponent of expert testimony in a medical malpractice case must satisfy the court that the expert is qualified under MRE 702, MCL 600.2169, and MCL 600.2955. The court also redefined the gatekeeper’s role, as discussed in *Gilbert*:

Consistent with this role, the court “shall” consider all of the factors listed in MCL 600.2955(1). If applicable, the proponent must also satisfy the requirement of MCL 600.2955(2) to show that a novel methodology or form of scientific evidence has achieved general scientific acceptance among impartial and disinterested experts in the field. [*Clerc, supra* at 1068.]

In the case at bar, there is no dispute between the parties that Dr. Johnson was qualified to testify as an expert witness in this case under MCL 600.2169 as a board-certified urologist who performs bladder-suspension surgeries. This case instead involves whether Dr. Johnson’s opinions satisfied both MRE 702 and MCL 600.2955.

MCL 600.2955 provides:

(1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:

(a) Whether the opinion and its basis have been subjected to scientific testing and replication.

(b) Whether the opinion and its basis have been subjected to peer review publication.

¹ See *People v Davis*, 343 Mich 348; 72 NW2d 269 (1995), and *Frye v United States*, 54 App DC 46; 293 F 1013 (1923).

(c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

(d) The known or potential error rate of the opinion and its basis.

(e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, “relevant expert community” means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.

(f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.

(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

(2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

(3) In an action alleging medical malpractice, the provisions of this section are in addition to, and do not otherwise affect, the criteria for expert testimony provided in section 2169.

The trial court accepted Dr. Johnson’s initial opinion that sutures can erode into the bladder after the procedure defendant used in this case, the Stamey procedure, is performed. In fact, plaintiff’s own expert and the surgeon who performed subsequent procedures on plaintiff to remove two sutures agreed that sutures could erode into the bladder. However, plaintiff’s theory of erosion involved sutures found on the inside of the bladder’s walls that entered from the outside of the same bladder wall. In contrast, Dr. Johnson opined that the suture found in the dome, or top, of the bladder also entered the bladder by way of erosion. However, that suture was not found in a spot near where a properly placed suture would have been located.

The medical literature supported Dr. Johnson’s proffered testimony on suture erosion as a complication of bladder-suspension surgery, and he satisfied the criteria in MCL 600.2955 on that point. However, the literature only addresses the issue of suture erosion and does not include any discussion on migration of suture material once inside the bladder.

While the articles produced by defendant support a finding that suture erosion can be a complication of bladder suspension surgery, they do not support Dr. Johnson’s theory that the suture found at the dome of plaintiff’s bladder eroded into the bladder and migrated there in such a short span of time. The problem, therefore, that the trial court found with Dr. Johnson’s testimony was that even if a suture could have eroded its way into the bladder, Dr. Johnson did not have any explanation for how the suture could have reached the top portion of the bladder by way of erosion through a sidewall or at the bladder’s neck.

In its ruling, the trial court explained that it would not admit Dr. Johnson's testimony because he failed to explain how a suture at the bottom of the bladder migrated to the dome of the bladder. Defendant challenges this part of the trial court's ruling as an improper finding of fact that should have been resolved by the jury. We disagree. Instead, this portion of the trial court's ruling was based on Dr. Johnson's application of the erosion theory to the facts of this case.

Defendant argues on appeal that his theory was that that suture migrated to the dome of the bladder from an anchor suture placed near the top of the bladder. However, defendant has not cited to factual support in the record to support this statement. Defendant has not produced any evidence that a suture was properly placed in close proximity to the dome of the bladder, thus explaining how the suture could have ended up in the dome simply by way of erosion through a nearby bladder wall.

Defendant has attached to his reply brief on appeal a copy of a diagram from a medical text that shows that the neck of the bladder is essentially at the bottom. The neck is not located at the top of the bladder, as the trial court correctly noted in its ruling. Defendant concedes that sutures are placed at the neck of the bladder to lift it up to create the suspension, but then simply states, without providing any factual support, that anchor sutures were also placed near the dome of the bladder to lift it up.

Dr. Johnson explained that the Stamey procedure, as defendant performed it, involves placing sutures on each side of the neck of the bladder; then "Prolene" material is run "through the fascia of the abdominal muscles, through the rectus muscle, behind the pubic bone in front of the bladder, and then down into the vagina on the right and left side of the urethra." Dr. Johnson believed that the suture found in the dome eroded through the anterior wall, which was distinct from the dome of the bladder. We believe that the trial court correctly noted in its ruling that Dr. Johnson's opinion about the suture erosion did not adequately support defendant's theory that the suture could have simply eroded through a wall and ended up in the dome, based upon the placement of the sutures. There was no indication that sutures were properly placed in close proximity to the dome such that simply eroding through the bladder wall would have allowed the suture to enter the dome. Instead, it appears that, according to Dr. Johnson's description, the only actual sutures that were placed in close proximity to the bladder were at the neck. Thus, the trial court ruled that defendant failed to explain how the sutures at the bottom (or the neck) could have ended up, through simple erosion over a short period of time, in the dome of the bladder.

The trial court correctly refused to admit Dr. Johnson's testimony based on his failure to show that suture erosion could have, under the facts of this case, explained how a suture ended up in the dome of plaintiff's bladder. While defendant argues that the trial court's ultimate ruling invaded the jury's province because the court made findings of fact, the trial court correctly questioned Dr. Johnson's testimony on the ground that his theory did not properly take into account all the facts of this case, i.e., the placement of the sutures and where the suture was later found in plaintiff's bladder. The trial court did not need to make any findings, but had to apply Dr. Johnson's theory to the facts of this case to see if it reasonably explained how defendant believed the suture could have entered the dome absent malpractice. Given the demands imposed by *Gilbert* and *Clerc*, the trial court was required to perform an intensive review of Dr. Johnson's proposed testimony to determine if his opinions were not only supported by medical research, but the facts of this case. Ordinarily, disagreements with an expert

witness's interpretation of the facts involve the weight of the expert's testimony, not its admissibility, *Surman v Surman*, 277 Mich App 287, 309-310; 745 NW2d 802 (2007), but here the trial court was obligated to review the factual data Dr. Johnson was relying on to support his opinion; the court had to determine as a preliminary question if that opinion was reliable and should be considered by the jury.²

The trial court did not abuse its discretion in ruling that Dr. Johnson's testimony as an expert witness in this matter should be limited. Furthermore, the trial court did not make any findings of fact regarding the credibility of either plaintiff's or defendant's theories when making its ruling on the admissibility of Dr. Johnson's testimony.

Next, defendant argues that plaintiff did not comply with MCL 600.2912b when filing her notice of intent because she failed to include any claim in the notice that sutures eroded into the bladder because they were placed too close to the midline of the bladder. MCL 600.2912b(1) provides that before a party may commence an action for medical malpractice, he must provide written notice of the claim not less than 182 days before the action is commenced. *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 685 n 2; 684 NW2d 711 (2004). The burden is on the plaintiff to show compliance with MCL 600.2912b. *Roberts, supra* at 691.

Section 2912b(4) sets forth the requirements for the notice; it provides:

The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:

- (a) The factual basis for the claim.
- (b) The applicable standard of practice or care alleged by the claimant.
- (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
- (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
- (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
- (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

While defendant challenged plaintiff's notice of intent at the time of trial, he did so on different grounds than now argued on appeal. Additionally, it appears that the trial court rejected

² MRE 703 requires that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence."

any objection related to the notice of intent because defendant was required, by the court's scheduling order, to raise it at least seven days before trial. "This Court reviews for an abuse of discretion a trial court's decision to decline to entertain motions filed after the deadline set forth in its scheduling order." *Kemerko Clawson, LLC v RxIV, Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005). Moreover, we will not reverse on the merits of issues not properly raised before the trial court unless the defendant shows that a plain error occurred that affected his substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Trial courts have the authority to set deadlines for the filing of motions. MCR 2.401(B)(2)(a)(ii). That rule gives the court the discretion to decline to hear motions filed after a deadline. *Kemerko*, *supra* at 349. Because defendant has not established that it was error for the trial court to rule that this issue was waived, he has not established grounds for reversal.³

Further, in *Roberts*, *supra* at 691, the Court acknowledged that because a notice under § 2912b must be filed at the beginning of a case before discovery has commenced, the plaintiff will likely not have had access to medical records of the defendant before the notice must be filed. Therefore, it is reasonable to believe that the plaintiff's averments regarding the standard of care may be inaccurate after formal discovery occurs. *Id.* Accordingly, the Court held that the plaintiff is only required to "make a good-faith effort to aver the specific standard of care that she *is claiming* to be applicable to each particular professional or facility that is named in the notice." *Roberts*, *supra* at 692 (footnote omitted; emphasis in original).

Plaintiff's notice of intent primarily found fault with defendant for perforating the bladder, but also alleged that he did not use due care and skill in his placement of the sutures and that the sutures were inappropriately placed. We believe that the allegations contained in the notice of intent were sufficient enough to put defendant on notice that plaintiff was claiming that he violated the standard of care by negligently placing the sutures that another doctor later was required to remove. The theory was later developed during discovery that this was negligence because the sutures were placed too close to the midline and that this caused the sutures to erode into the bladder. Defendant has failed to show that reversal is required.

Next, defendant argues that plaintiff's expert witness, Dr. Malcolm Schwartz, was not qualified to testify that sutures eroded through plaintiff's bladder wall. Defendant had moved to strike the testimony under MRE 702. However, because defendant did not move to strike Dr. Schwartz's testimony until trial was already underway, it appears that the trial court refused to grant the motion because it was untimely under the court's scheduling order. As noted above, trial courts have the authority to set deadlines for the filing of motions. MCR 2.401(B)(2)(a)(ii). That rule gives the court the discretion to decline to hear motions filed after a deadline.

³ Although the Supreme Court has held that § 2912b does not require a party to object to a notice of intent before a certain stage of the litigation, *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 66; 642 NW2d 663 (2002), defendant may not now challenge the sufficiency of the notice of intent regarding the suture placement for the first time on appeal. That argument is waived because it was never addressed by the trial court. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003).

Kemerko, supra at 349. On the facts, we cannot conclude that the trial court abused its discretion in refusing to strike Dr. Schwartz's testimony.

Nonetheless, on the merits, we find that no error occurred. In conjunction with a review of the testimony of defendant's expert witness, medical reports and literature were offered that supported Dr. Schwartz's opinion that sutures may erode, even if he was not aware of any such support at the time he testified. Defendant, in fact, argued that that theory has been recognized and supported by the medical community. Although it is not common, suture erosion has been documented and it is not a novel phenomenon.

Dr. Schwartz's testimony was that two sutures perforated the bladder wall through erosion because they were improperly placed outside of the bladder. There was no evidence offered in this case that these sutures migrated any substantial distance from where they were originally placed during the surgery. Therefore, plaintiff's expert did not have the same problem that defendant's expert encountered, even though the defense's erosion theory also involved suture migration.

Dr. Schwartz believed that once defendant went back in and cut the suture that was in the dome of plaintiff's bladder, this left at least one sharp end of the continuous Prolene material used to hold the bladder up near the bladder. That material is exceptionally strong, and the sharp ends of the Prolene were what Dr. Schwartz believed may have eroded into the bladder to cause further problems for plaintiff. Because plaintiff's erosion theory was distinguishable from defendant's and was supported by the facts, defendant has not shown that plain error occurred. On the merits, defendant has not shown that the court should not have admitted Dr. Schwartz's testimony.

Defendant also argues that he was entitled to a directed verdict. To survive a motion for a directed verdict in a medical malpractice case, the plaintiff must make a prima facie showing of "(1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. MCL 600.2912a." *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994).

Defendant argues that he was entitled to a directed verdict because Dr. Schwartz's testimony was inadmissible and, as a result, plaintiff could not establish a prima facie case of malpractice. Because we conclude that the trial court properly admitted Dr. Schwartz's testimony and his testimony supported all elements of a prima facie case, the trial court did not err in refusing to grant a directed verdict.

Lastly, defendant argues that the trial court erred in instructing the jury on *res ipsa loquitur*. This Court reviews claims of instructional error *de novo*. *Ward v Consolidated Rail Corp*, 472 Mich 77, 83; 693 NW2d 366 (2005). "Jury instructions should not omit material issues, defenses, or theories that are supported by the evidence." *Id.* at 83-84.

As noted above, in a medical malpractice case, a plaintiff must prove the following elements: "(1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. MCL 600.2912a." *Locke, supra* at 222.

Evidence of a bad result is insufficient, in itself, to prevail under a theory of res ipsa loquitur. *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). Instead,

[w]here a plaintiff raises res ipsa loquitur in the medical malpractice context, we require that the plaintiff prove that the event (1) is of a kind that ordinarily does not occur in the absence of someone's negligence, (2) is caused by an agency or instrumentality within the exclusive control of defendant, and (3) is not due to any voluntary action or contribution on the part of the plaintiff. [*Id.*; footnote omitted.]

Evidence that an injury does not ordinarily occur in the absence of negligence must be supported by expert testimony or be within the common understanding of the jury. *Locke, supra* at 231.⁴

In this case, there was expert testimony that a suture should not remain in the bladder after the Stamey procedure. Further, the evidence indicated that a suture was found in the dome of plaintiff's bladder, and all experts agreed that it should not have been there. Although defendant argues that erosion of a suture can occur absent negligence, the evidence indicated that erosion occurs over a longer span of time, not shortly after a surgical procedure and in a manner leading, under the specific facts of this case, to a suture's being found in the bladder dome. Because the evidence showed that defendant discovered the suture in the dome of plaintiff's bladder shortly after the surgery, and that, after the cutting of the suture, a sharp end of the suture material was left loose in the bladder, the instruction on res ipsa loquitur was appropriate.

Affirmed.

/s/ Donald S. Owens
/s/ Patrick M. Meter
/s/ Bill Schuette

⁴ Although defendant asserts that plaintiff failed to allege res ipsa loquitur in her complaint, he does not cite any authority for the proposition that she was therefore precluded from asserting this doctrine at trial. Further, because the trial court could amend the pleadings to conform to the evidence and theories raised at trial, MCR 2.118(C)(1) and (2), and defendant did not argue below that amendment would not be justified, appellate relief on this basis is not warranted.